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Article 7

Constitutional Law - Validity of Wis. Stat. (1953) Section 105.13 Regulating Employment Agencies

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derman to another, or of "tenants in remainder" as the opinion in this case labels it.[15]

As life tenant, W could give a valid lease for her life. A remainderman can also contract or convey in reference to the remainder,[16] at least when it is vested,[17] as in the principal case. Since W and D were not tenants in common, there was, as the court held, no question of an ouster.

The fact that W and D were not tenants in common might have caused some difficulties had a partition action been started prior to W's death. In the absence of statutes, a cotenant has the power to secure partition only if he is entitled to seisin or possession.[18] Since W and D were not cotenants of this type, neither could have maintained such an action and this is true even though W has in addition to her remainder the right to possession by virtue of her life estate.[19] However, statutes governing partition now exist in every state.[20] Some of them vary the common law rule and allow additional parties to maintain such an action.

The statutes in Nebraska[21] and Wisconsin[22] allow a co-remainderman holding an indefeasible, vested interest to compel partition.[23] Therefore, in Wisconsin and Nebraska either W or D could have brought action to partition the remainder interest.

DONALD GANCER

Constitutional Law—Validity of Wis. Stats. (1953) Section 105.13, Regulating Employment Agencies—The petitioner was denied the right to open and operate an employment agency by an order of the Wisconsin Industrial Commission made pursuant to the authority vested in the commission by WIS. STATS. (1953) Section 105.13 which reads as follows:

> **Refusal to issue and revocation of license.** It shall be the duty of the industrial commission, and it shall have the power, jurisdiction and authority to issue licenses to employment agents, and to refuse to issue such license whenever, after due investigation the commission or a majority of the members thereof finds that the character of the applicant makes him unfit to be an employ-

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[15] 68 N.W.2d at 606.
[16] 31 C.J.S., *Estates,* §88, p. 100 (1942).
[17] Ruggles v. Tyson, 104 Wis. 500, 79 N.W. 766, 81 N.W. 367 (1889). A contingent remainder is also alienable in Wisconsin, WIS. STATS. (1953) §230.35; First Wisconsin Trust Co. v. Taylor, 242 Wis. 127, 7 N.W.2d 707 (1943).
[18] Morse v. Stockman, 65 Wis. 36, 26 N.W. 176 (1885).
[19] Shannon v. Ogletree, 202 Ala. 219, 80 So. 41 (1918).
[20] 2 RESTATEMENT, PROPERTY, ch. 11, topic 1, Intro. Note (1936).
[21] NEB. COMP. STAT. (1929) §20-2170.
[22] WIS. STATS. (1953) §276.01.
[23] 2 RESTATEMENT, PROPERTY, ch. 11, Topic 1, Special Note (1948 Supp.); Greeny v. Greeny, 155 Wis. 621, 145 N.W. 201 (1914).

> ment agent, or when the premises for conducting the business of an employment agent is found upon investigation to be unfit for such use, or whenever, upon investigation by the commission, it is found and determined that the number of licensed employment agents or that the employment agency operated by the United States, the state or by the municipality or by two or more thereof jointly in the community in which the applicant for a permit proposes to operate is sufficient to supply the needs of employers and employees.

After an investigation, the commission found the applicant fully qualified, and the proposed premises for the agency satisfactory. The application was denied solely on the ground that the existing employment agencies were sufficient in number to supply the needs of the particular community. Petitioner, in appealing from this order, attacked Section 105.13 on the grounds that it delegates legislative authority, and that it authorizes prohibition rather than regulation of a lawful business. *Held:* In a 4-3 decision, the court affirmed the order of the Wisconsin Industrial Commission, at the same time, holding that the commission's authority is merely regulatory; and that no unconstitutional delegation of legislative discretion is present in this case. *Robert C. Graebner v. Industrial Commission, 68 N.W. 2d 715 (1955) (Wis.).*

The court, on the premise that the commission's power was merely regulatory, refused to follow *Adams v. Tanner,* which had said:

> "The business of securing honest work for the unemployed in return for an agreed consideration is a useful and legitimate business, which, though subject to regulation under the state police power, cannot be forbidden by an act of a state without violating the guarantees of liberty secured by the Fourteenth Amendment."[1]

The court also rejected the decision of the Minnesota Court in *Engberg v. Debel,*[2] a case which declared void a statute similar to Section 105.13. Although admitting the case was almost identical on its facts, the majority considered itself bound by Wisconsin precedent.

The decisions cited as precedent for both points of law raised by petitioner, involved the validity of a municipal ordinance delegating discretion to the mayor to grant or deny licenses to junk shops and dance halls;[3] business generally considered subject to a great degree of legislative control, due to their particular nature. Moreover, the cited cases deal mainly with the validity of prescribed standards.

The present decision does nothing to demonstrate that the employ-

[1] 244 U.S. 590, 37 S.Ct. 622, 61 L.Ed. 1336 (1917).
[2] 194 Minn. 394, 260 N.W. 626 (1935).
[3] The cases cited by the court are Mehlos v. City of Milwaukee, 156 Wis. 591, 146 N.W. 882, 51 L.R.A. (N.S.) 1009 (1914); City of Milwaukee v. Ruplinger, 156 Wis. 391, 145 N.W. 42 (1914); Lerner v. City of Delevan, 203 Wis. 32, 233 N.W. 608 (1930); State ex rel. Bluemond Amusement Park v. Mayor, 207 Wis. 199, 240 N.W. 847, 79 A.L.R. 281 (1932).

ment agency business is not a fully useful business. It makes no effort to logically demonstrate why employment agencies should be placed in the same category as junk shops and dance halls. In assuming the position it does, the court goes further in extending state police power over legitimate and useful businesses, other than financial institutions, than any previous decision; and it stands alone among the cases involving the regulation of employment agencies.

A strong dissent was written by Chief Justice Fairchild, and concurred in by Mr. Justice Broadfoot and Mr. Justice Steinle. Noteing that the majority had expressly held an employment agency to be a lawful business, and moreover, that there was no indication of a lack of integrity on the part of the applicant, the dissent finds it difficult to see why an applicant may be prohibited from entering his chosen occupation solely on the ground that the field is sufficiently filled.

In summing up his feelings as to the danger inherent in the attitude of the majority Justice Fairchild says:

> "It used to be quite clear that the framers of our state and federal constitutions did not incorporate blindly the provisions guaranteeing life, liberty, and the pursuit of happiness. And it is equally clear today that it was not intended by those framers of the constitutions that modern efforts to insure integrity in administrative conduct of business should violate those provisions to the extent of classifying by restriction those who may and those who may not engage in a lawful calling to be selected by an individual. Competition and individual enterprise have not been entirely written off as obsolete. A conservatism that clings to the broad fundamentals written into our bill of rights is well-grounded liberalism. True, the public may be protected against the machination of men lacking in integrity, but that does not mean that one of several qualified men shall be permitted to enter a legitimate field of enterprise and the opportunity denied to others."

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[4] For a discussion of the validity of state legislation regulating employment agencies, see the annotations in 56 A.L.R. 1340 and 133 A.L.R. 1505, with cases cited therein.